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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCIAL VILLARINO, III

Plaintiff,

No. 2: 12-cv-0889 WBS JFM (PS)

vs.

SPECIALIZED LOAN SERVICING,
LLC, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff filed suit in state court against the defendants bringing claims arising from defendants alleged misconduct related to a residential loan. The defendants removed the case to this court on the basis of diversity jurisdiction. (See Dkt. No. 2.)

On April 13, 2012, defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (See Dkt. No. 7.) Plaintiff did not file an opposition nor did he file a statement of non-opposition to the motion to dismiss. On October 9, 2012, defendants' motion to dismiss was granted. However, plaintiff was given ten days to file an amended complaint. (See Dkt. No. 19.) To date, has not filed an amended complaint.

On December 19, 2012, defendants filed a motion to dismiss for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b). (See Dkt. No. 20.) Plaintiff did not file a response to the motion to dismiss for lack of prosecution nor did he appear at the

1 motion hearing on January 31, 2012 at 11:00 a.m. in Courtroom # 26.

2 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
3 an action for failure to comply with an order of the court.” See Ferdik v. Bonzelet, 963 F.2d
4 1258, 1260 (9th Cir. 1992).

5 In determining whether to dismiss a case for failure to comply with
6 a court order the district court must weigh five factors
7 including: “the public’s interest in expeditious resolution of the
8 litigation; (2) the court’s need to manage its docket; (3) the risk of
9 prejudice to the defendants; (4) the public policy favoring
10 disposition of cases on their merits; and (5) the availability of less
11 drastic alternatives.”

12 Id. at 1260-61 (quoting Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also
13 Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

14 The first two factors favor dismissal of this case. This action has been pending in
15 federal court for almost ten months, and yet, plaintiff still has not filed an amended complaint
16 after having being given ten days to do so on October 9, 2012. Additionally, plaintiff’s failure to
17 comply with the October 9, 2012 order as well as his failure to respond to defendants’ motion to
18 dismiss for failure to prosecute indicates that he has abandoned this action. Further time spent
19 by the court will consume scarce resources in addressing litigation in which plaintiff
20 demonstrates no intention to pursue.

21 The third factor also favors dismissal. Indeed, defendants themselves have moved
22 to dismiss for plaintiff’s failure to prosecute. Furthermore, defendants would only be
23 disadvantaged by a decision to continue an action plaintiff has abandoned.

24 The fifth factor also favors dismissal. The court has given plaintiff ample time,
25 above and beyond the ten days granted by the court for plaintiff to file an amended complaint.
26 There does not appear to be a suitable alternative to dismissal of this action.

Finally, while the fourth factor, public policy favoring disposition of cases on
their merits, weighs against dismissal, the other factors strongly support dismissal. Thus,
defendant’s motion to dismiss should be granted.

1 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion to
2 dismiss for lack of prosecution be granted and that this matter be dismissed with prejudice
3 pursuant to Federal Rule of Civil Procedure 41(b).

4 These findings and recommendations are submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
6 days after being served with these findings and recommendations, any party may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
9 shall be served and filed within fourteen days after service of the objections. The parties are
10 advised that failure to file objections within the specified time may waive the right to appeal the
11 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: February 4, 2013.

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15 UNITED STATES MAGISTRATE JUDGE

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